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8

9 UNITED STATES DISTRICT COURT  
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA-OAKLAND

11

12 PETER MCNEFF, an individual, ) Case No.: 4:23-cv-00106  
13 Plaintiff, )  
14 vs. )  
15 )  
16 )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
Defendants. )  
)

) PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS

) CURRENT DATE: 6-22-2023  
13 THE PLEASANTON POLICE ) TIME: 2:00PM  
14 DEPARTMENT, a Division of defendant City; ) COURTROOM: 10  
15 DAVID SWING, an individual; )  
16 LARRY COX, an individual; )  
BRIAN DOLAN, an individual; and )  
DOES 1-10, individuals; )  
)

Plaintiff, PETER MCNEFF, submits the following Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss.

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**Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss**

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**Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss**

1                   **MEMORANDUM OF POINTS AND AUTHORITES**

2                   **I. INTRODUCTION**

3                   Plaintiff is a former Police Officer with the City of Pleasanton, California. He  
4                   attended a “Stop the Steal” rally on January 6, 2021, in Sacramento, California. He was  
5                   subsequently terminated, after being placed on leave for more than one year, for allegedly  
6                   violating Department policies. He alleges retaliation wrongful termination for engaging in  
7                   First Amendment protected speech, namely protected political activity/speech. (42 United  
8                   States Code section 1983, California Labor Code sections 1101, 1102, and California  
9                   Government Code section 3201, *et. seq.*)

10                  Defendants move to dismiss all of Plaintiff’s causes of action alleged in the Amended  
11                  Complaint on various grounds. Based upon the foregoing Plaintiff contends none of these  
12                  arguments have merit. However, should this Court find merit in any of Defendants’  
13                  contentions in their Motion to Dismiss, Plaintiff requests a reasonable opportunity to file a  
14                  Second Amended Complaint to cure any deficiencies in the Amended Complaint (hereinafter  
15                  referred to as “AC”).

16                  **II. SUMMARY OF FACTS**

17                  MR. MCNEFF was a 5+ year veteran of the DEPARTMENT. His position at the time  
18                  of his termination by the DEPARTMENT was Officer. Until the events described herein,  
19                  MR. MCNEFF had an exemplary record and had been recognized for numerous outstanding  
20                  acts, commendations, and superior performance throughout his career. His positive  
21                  performance evaluations span several years and describe him as an officer who consistently  
22                  demonstrates good judgment, a prepared leader, and an officer with exceptional motivation  
23                  and drive. MR. MCNEFF was even described as an officer who consistently behaves in a

1 manner which supports teamwork to accomplish the department's goals and objectives. (AC  
 2 ¶ 12.)

3 On January 6, 2021, MR. MCNEFF attended a political rally, specifically a "Stop the  
 4 Steal" rally, in Sacramento, California. He did so as a private citizen and during his personal  
 5 time. He did not identify himself as a police officer at this political rally. He wore civilian  
 6 clothing to the political rally. MR. MCNEFF posted pictures of himself with his wife, dressed  
 7 in civilian clothing, at this political rally, on his personal Facebook page. This Facebook page  
 8 was used under a pseudonym, "Jonathan P." There is no evidence that MR. MCNEFF did  
 9 anything other than attend and observe the political rally. (AC ¶ 13.)

10 Immediately following his attendance at this political rally, Defendant Cox labeled  
 11 Plaintiff a racist, political extremist, and a radical supporter of violence, potentially criminal  
 12 organizations. This defamatory and damaging label was shared with and adopted by  
 13 Defendant Swing. Plaintiff was placed on leave and the Department, under the guidance of  
 14 Swing, Swing, retained an outside law firm to investigate the outrageous allegations put forth  
 15 by Cox. (AC ¶¶ 19-20 .)

16 During the course of many, many months, this outside law firm interviewed several  
 17 members of the Pleasanton Police Department. Each interview further damaged Plaintiff as  
 18 the law firm portrayed him as a racist, radical extremist. Plaintiff's colleagues were  
 19 repeatedly questioned about Plaintiff's alleged racists tendencies and behaviors, despite their  
 20 statements that Plaintiff was nothing of the sort and that he exhibited professional behavior.  
 21 (AC ¶¶ 32-33.)

22 Nevertheless, the investigation persisted in an effort to find some reason to justify the  
 23 Departments actions of unlawfully placing Plaintiff on leave and further damaging his  
 24 character and reputation by labeling him a racist and radical extremist. Ultimately, the

1 Department terminated Plaintiff for pretextual “violations of policy,” all the while knowing  
 2 the true reason was to remove an employee who would attend a political rally and express a  
 3 political belief the Defendants deemed unpopular and even moronic. While Swing was  
 4 impliedly named as the final decision maker, Dolan, acting on behalf of Defendant City,  
 5 ratified this decision to terminate Plaintiff’s employment on February 4, 2022. (AC ¶¶ 61,  
 6 62.)

### 7 III. LEGAL STANDARD

8 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the  
 9 legal sufficiency of the opposing party's pleadings. Dismissal of an action under Rule  
 10 12(b)(6) is proper where there is either a "lack of a cognizable legal theory or the absence of  
 11 sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police*  
 12 *Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). When considering a motion to dismiss for failure to  
 13 state a claim under Rule 12(b)(6), all allegations of material fact must be accepted as true and  
 14 construed in the light most favorable to the pleading party. *Cahill v. Liberty Mut. Ins. Co.*, 80  
 15 F.3d 336, 337-38 (9th Cir. 1996). The inquiry is generally limited to the allegations made in  
 16 the complaint. *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

17 Federal Rule of Civil Procedure 8(a)(2) "requires only "a short and plain statement of  
 18 the claim showing that the pleader is entitled to relief in order to 'give the defendant fair  
 19 notice of what the . . . claim is and the grounds upon which it rests.' " *Bell*  
 20 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41,  
 21 47 (1957)). To overcome a Rule 12(b)(6) challenge, the complaint must allege "enough facts  
 22 to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A claim is  
 23 plausible on its face when "the plaintiff pleads factual content that allows the court to draw  
 24 the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*

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<sup>1</sup> *v. Iqbal*, 556 U.S. 662, 678 (2009). A plausible claim is one which provides more than “a  
<sup>2</sup> sheer possibility that a defendant has acted unlawfully.” *Id.* A claim which is possible, but  
<sup>3</sup> which is not supported by enough facts to “nudge [it] across the line from conceivable to  
<sup>4</sup> plausible . . . must be dismissed.” *Twombly*, 550 U.S. at 570.

<sup>5</sup> A complaint facing a Rule 12(b)(6) challenge ‘does not need detailed factual  
<sup>6</sup> allegations, [but] a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’  
<sup>7</sup> requires more than labels and conclusions, and a formulaic recitation of the element of a cause  
<sup>8</sup> of action will not do.’ *Id.* at 555 (internal citations omitted). In essence, “a complaint . . . must  
<sup>9</sup> contain either direct or inferential allegations respecting all the material elements necessary to  
<sup>10</sup> sustain recovery under some viable legal theory.” *Id.* at 562. To the extent that any defect in  
<sup>11</sup> the pleadings can be cured by the allegation of additional facts, the plaintiff should be  
<sup>12</sup> afforded leave to amend, unless the pleading “could not possibly be cured by the allegation of  
<sup>13</sup> other facts.” *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242,  
<sup>14</sup> 247 (9th Cir. 1990).

#### <sup>15</sup> IV. ARGUMENT

##### <sup>16</sup> a. Plaintiff’s First Claim Has Merit.

###### <sup>17</sup> i. Plaintiff stated and established a valid claim for relief against the <sup>18</sup> individual defendants.

<sup>19</sup> Plaintiff identified a claim for relief. Indeed, he identified a policy and decision by a  
<sup>20</sup> final policy maker to purge the Department of employees with constitutionally protected,  
<sup>21</sup> expressed political views that these decision makers deemed unpopular. Moreover, Plaintiff  
<sup>22</sup> established he was placed on leave, disparaged, harassed, and his character and reputation  
<sup>23</sup> maligned after he attended a constitutionally protected, lawful political rally and expressed his  
<sup>24</sup> political views deemed unpopular, even stupid and moronic by Department superiors.

1       Specifically, Plaintiff alleges that the Defendants Cox and Swing retaliated against  
 2 him for participating in protected speech, specifically, for the act of attending a “Stop the  
 3 Steal” rally on January 6, 2021. Defendants argue that Plaintiff failed to plead sufficient facts  
 4 to support his § 1983 claim for a First Amendment violation claim. Defendants are incorrect.

5       To state a claim under § 1983, a plaintiff must allege that the conduct complained of  
 6 was committed by a person acting under color of state law, and the conduct deprived plaintiff  
 7 of rights, privileges or immunities secured by the Constitution or laws of the United  
 8 States. *Jensen v. City of Oxnard*, 145 F.3d 1078, 1082 (9th Cir. 1998). Where a public  
 9 employee is claiming that his first amendment rights have been violated, the Court applies a  
 10 five-step test to balance the government’s rights as an employer and the plaintiff’s rights as a  
 11 citizen. The plaintiffs bear the burden of showing that: (1) the speech addressed a matter of  
 12 public concern; (2) the speech was spoken in the capacity of a private citizen and not a public  
 13 employee; and (3) the state took adverse employment action and the speech was a substantial  
 14 or motivating factor in the adverse action. If the plaintiff has alleged the first three steps, the  
 15 burden shifts to the government to show (4) whether the state had an adequate justification for  
 16 treating the employee differently from other members of the general public; and (5) whether  
 17 the state would have taken the adverse employment action even absent the protected  
 18 speech. *Eng v. Cooley*, 552 F.3d 1062, 1070-72 (9th Cir. 2009). Because plaintiff’s failure to  
 19 satisfy one of the first three steps “necessarily concludes [the] inquiry,” *Huppert v. City of*  
 20 *Pittsburgh*, 574 F.3d 696, 703 (9th Cir. 2009) (*overruled on other grounds by Dahlia*  
 21 *v. Rodriguez*, 735 F.3d 1060, 1066 (9th Cir. 2013)), the court addresses the first three steps  
 22 only.

23       Defendants make no claims that Plaintiffs attendance at the political rally and/or  
 24 political expression were not protected forms of speech. Thus, Plaintiff will not engage in a

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1 thorough analysis here. Rather, Plaintiff assumes that Defendants agree attendance at a  
 2 political rally and expressing conservative political views are protected speech under the First  
 3 Amendment.

4 Contrary to Defendants motion, this complaint alleges sufficient facts to state a claim  
 5 to relief that is “plausible on its face.” *Twombly*, 550 U.S. at 570. Plaintiff has established  
 6 factual content that demonstrates he was punished (placed on leave), harassed, disparaged,  
 7 and his character and reputation maligned by the Defendants immediately following his  
 8 attendance at a constitutionally protected, lawful political rally. This court must draw the  
 9 reasonable inference that Plaintiff suffered harm as a result of this rash, immediate response to  
 10 his political expression by the Defendants. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

11                   **ii. The individual defendants are NOT entitled to qualified immunity.**

12 The individual Defendants are not entitled to the defense of qualified immunity  
 13 because Plaintiff plausibly alleged they violated his clearly established First Amendment right  
 14 to free political speech and expression and to be free from retaliation for doing so.

15 “The doctrine of qualified immunity shields government officials performing  
 16 discretionary functions from liability for damages ‘insofar as their conduct does not violate  
 17 clearly established statutory or constitutional rights of which a reasonable person would have  
 18 known.’” *Dunn v. Castro*, 621 F.3d 1196, 1198-99 (9th Cir. 2010) (quoting *Harlow v.*  
 19 *Fitzgerald*, 457 U.S. 800, 818 (1982)). A qualified immunity analysis consists of a two-step  
 20 procedure. *id.* at 1199. First, the court must determine “whether the facts alleged, construed in  
 21 the light most favorable to the injured party, establish the violation of a constitutional  
 22 right.” *id.*(citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Next, the court must determine  
 23 “whether the right is clearly established such that a reasonable government official would

1 have known that ‘his conduct was unlawful in the situation he confronted.’ ” *Id.* (quoting  
 2 *Saucier*, 533 U.S. at 202.)

3       “Qualified immunity is an affirmative defense that must be raised by a  
 4 defendant.” *O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016) (quoting *Groten v.*  
 5 *California*, 251 F.3d 844, 851 (9th Cir. 2001)). The Supreme Court has emphasized that the  
 6 issue of qualified immunity be decided “at the earliest possible stage in litigation.” *Hunter v.*  
 7 *Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (simplified). However, the Ninth Circuit  
 8 instructed that the issue is one *not generally resolved on a motion to dismiss*. See *Keates v.*  
 9 *Koile*, 883 F.3d 1228, 1234-35 (9th Cir. 2018) (denying motion to dismiss on basis of  
 10 qualified immunity and noting that “[determining claims of qualified immunity at the motion-  
 11 to-dismiss stage raises special problems for legal decision making”). In deciding qualified  
 12 immunity on a motion to dismiss, “[i]f the operative complaint ‘contains even one allegation  
 13 of a harmful act that would constitute a violation of a clearly established constitutional right,’  
 14 then plaintiffs are ‘entitled to go forward’ with their claims.” *Id.* at 1235 (citing *Pelletier v.*  
 15 *Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 872 (9th Cir. 1992)). In fact, when  
 16 resolving a motion for summary judgment on the issue of qualified immunity, the court must  
 17 “adhere to the fundamental principle that at the summary judgment stage, reasonable  
 18 inferences should be drawn in favor of the nonmoving party.” *Tolan v. Cotton*, 572 U.S. 650,  
 19 657 (2014). If “genuine issue[s] of material fact exist that prevent a determination of qualified  
 20 immunity at summary judgment, the case must proceed to trial.” *Sandoval*, 756 F.3d at  
 21 1160 (internal quotation and citation omitted); cf. *Pierce v. Multnomah Cty.*, 76 F.3d 1032,  
 22 1038-39 (9th Cir. 1996) (holding, in context of a directed verdict, that when foundational facts  
 23 regarding a qualified immunity defense are disputed they must be decided by the jury before  
 24 the issue of qualified immunity can be resolved).

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1       Here, as stated above, Plaintiff plausibly alleges Defendants violated his clearly  
 2 established First Amendment right to political speech and expression and to be free from  
 3 retaliation for doing so. He plausibly alleged he was harassed, his character and reputation  
 4 maligned, and immediately placed on leave based on his political beliefs. Therefore,  
 5 Defendants are not entitled to qualified immunity at this stage of the litigation. *See*  
 6 *Keates*, 883 F.3d at 1235 (holding that the operative complaint “plausibly allege[d]” the  
 7 defendants violated the plaintiff’s rights and the district court “erred in dismissing” the  
 8 plaintiff’s claim based on qualified immunity); *see also Laizure v. Wash. Cnty. by & through*  
 9 *Wash. Cnty. Sheriff’s Off.*, No. 3:17-cv-1254-SB, 2018 WL 3638124, at \*5 (D. Or. July 13,  
 10 2018), *report and recommendation adopted sub nom. Laizure v. Washington Cnty.*, 2018 WL  
 11 3636539 (D. Or. July 31, 2018) (holding that “[the plaintiff] has pleaded sufficient facts to  
 12 allege violations of his First and Fourth Amendment rights, and therefore resolving the issue  
 13 of qualified immunity is not appropriate at this stage of the litigation”). Accordingly, this  
 14 Court should deny Defendants’ motion to dismiss on the basis of qualified immunity.

15       This complaint established that the Defendants were acting to unlawfully purge the  
 16 police department of those with conservative political views that the superior ranking officers  
 17 believed were moronic, even stupid. The entirety of the action taken against Plaintiff,  
 18 beginning with placing him on administrative leave up to and including his termination, was  
 19 motivated by and caused by the Defendants’ unlawful purge of employees with these  
 20 constitutionally protected, conservative political views. Again, as stated in the AC, any other  
 21 stated reason for Plaintiff’s termination was pretext. This action was taken to rid the  
 22 Department of those with conservative political views like Plaintiff’s and for no other reason.

23       Moreover, in their motion to dismiss, the Defendants misconstrue the significance of  
 24 the actions taken by Cox and then Swing. They oversimplify Cox’s actions claiming all he did

1 was “review an outside investigation.” Cox initiated and led that investigation. Cox was the  
 2 reason Plaintiff was originally placed on leave for simply attending a political rally. Cox was  
 3 biased and prejudiced against Plaintiff from the outset. Indeed, he believed Plaintiff  
 4 associated with criminal extremist organizations, absent any proof to corroborate or  
 5 substantiate this belief. It is likely he set out on a witch hunt to find reasons to terminate  
 6 Plaintiff. To claim he merely reviewed an outside investigation is disingenuous and ignores  
 7 the facts. Moreover, Cox was a key player in permitting, possibly even promoting, the  
 8 damage to Plaintiff’s character and reputation all of which stemmed from Plaintiff’s  
 9 attendance at a constitutionally protected political rally. Plaintiff suffered irreparable harm at  
 10 the hands and mouths of Cox and Swing. To claim they are immune from liability because  
 11 they discovered a potential policy violation is preposterous. Accordingly, this Court should  
 12 deny Defendants’ motion to dismiss on the basis of qualified immunity.

13                   **iii. Plaintiff established municipal liability.**

14 Plaintiff properly alleges that the City of Pleasanton faces municipal § 1983 liability  
 15 because the acts of retaliation alleged were taken by the City’s official policy makers.  
 16 Relevant here, Plaintiff alleges that the City conceded the Chief of Police was a final decision  
 17 maker during sworn arbitration testimony (AC ¶ 61).

18 Municipalities are included among those persons to whom § 1983 applies. *Monell*  
 19 v. *Dept. of Social Servs.*, 436 U.S. 658, 690 (1978). While municipalities are protected against  
 20 vicarious liability, § 1983 “imposes liability on a government that, under color of some  
 21 official policy, causes an employee to violate another’s constitutional rights.” *Id.* at 691-92  
 22 (internal quotation marks omitted). Municipal liability under *Monell* may be premised on “a  
 23 decision of a decision-making official who was, as a matter of state law, a final policymaking  
 24 authority whose edicts or acts may fairly be said to represent official policy in the area of

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1 decision.” *Gonzalez v. Cty. of Merced*, 2017 WL 6049179, at \*2 (E.D. Cal. Dec. 7, 2017); *see*  
 2 *also Thomas v. County of Riverside*, 763 F.3d 1167, 1170 (9th Cir. 2014); *Price v. Sery*, 513  
 3 F.3d 962, 966 (9th Cir. 2008).

4 Whether an official is a policymaker for *Monell* purposes is a question governed by  
 5 state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988). “Authority to make  
 6 municipal policy may be granted directly by a legislative enactment or may be delegated by  
 7 an official who possesses such authority, and of course, whether an official had final  
 8 policymaking authority is a question of state law.’ ” *Id.* (quoting *Pembaur v. Cincinnati*, 475  
 9 U.S. 469, 483 (1986) (plurality opinion)). As to matters of police policy, the chief of police  
 10 under some circumstances may be considered the person possessing final policy-making  
 11 authority. *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991); *see also Shaw*  
 12 *v. State of California Dept. of Alcoholic Beverage Control*, 788 F.2d 600 (9th Cir. 1986) (“As  
 13 to the City, the policies of the Police Department became its policies because the policies set  
 14 by the Department and its Chief may be fairly said to represent official [City] policy on police  
 15 matters . . . and the City is liable for any deprivation of constitutional rights caused by the  
 16 execution of official City policies.”) (Internal citations omitted).

17 Here, Plaintiff properly alleges that the policy of the City of Pleasanton is the Chief of  
 18 Police is the ultimate authority within the Department. (AC ¶ 61.) Plaintiff further stated that  
 19 the City agreed the “buck stops” with Chief Swing and Swing accepted the recommendation  
 20 of Cox to terminate Plaintiff. (AC ¶ 61.) As discussed above, Plaintiff has plausibly  
 21 connected the adverse employment actions and treatment he received with his attendance at a  
 22 constitutionally protected, lawful political rally. Because Plaintiff has alleged that the Chief  
 23 of Police was acting as a final policymaking authority for the City of Pleasanton on police

1 matters, and disciplined Plaintiff as a result of his political expression, Plaintiff has stated a  
 2 plausible claim for § 1983 municipal liability for Defendant City of Pleasanton.

3 The Defendants go to great lengths to argue that Swing is not a final policy maker and  
 4 that he merely reports to the City Manager. (See Motion, pp. 17-18). Yet, this is the exact  
 5 opposite of what they argued and established during the arbitration hearing in this case. They  
 6 cannot have it both ways. Either Swing is considered a final policymaker in regard to issues  
 7 within the police department, or the City was not truthful during the arbitration process. In  
 8 any event, because the complaint established that Swing chose to place Plaintiff on leave  
 9 immediately following Plaintiff's attendance at a constitutionally protected, lawful political  
 10 rally, Swing failed to question the outrageous, baseless conclusions made by a Sergeant in the  
 11 January 7, 2021 memorandum and instead took action against Plaintiff as a result of this  
 12 defamatory and unsubstantiated claims. Swing chose to hire the outside law firm that  
 13 investigated Plaintiff, Swing certainly was in charge at the Department and he is responsible  
 14 for the continued attacks on Plaintiff's character and reputation during the pendency of the  
 15 investigation, and finally, as established in the AC, Swing did have the final decision-making  
 16 power in this situation. Plaintiff has established municipal liability so the motion to dismiss  
 17 must be denied.

18 **b. Plaintiff's Second Claim is not barred because Plaintiff 's Department of**  
**Fair Housing and Employment ("DFEH") Amended Complaint is**  
**Excepted from the general requirements of the Tort Claims Act.**

21 The purposes and procedures of the Department of Fair Housing and Employment  
 22 demonstrate a legislative intent that actions against governmental entities brought under the  
 23 DFEH are to be excepted from the general requirements of the Tort Claims Act. The DFEH  
 24 constitutes a comprehensive scheme for combating employment discrimination, with specific

1 time limitations related to the remedies provided. *Snipes v. City of Bakersfield* (1983) 145  
 2 Cal.App.3d 861. In *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 764, the court  
 3 stated:

4 Exceptions to the filing requirement not specifically enumerated in the  
 5 Government Claims Act have occasionally been allowed, but only where the  
 6 claim is based on a statute or statutory scheme that includes a functionally  
 7 equivalent claim process. *Snipes v. City of Bakersfield*, supra, 145 Cal.App.3d  
 8 861 is illustrative. That case was an action against a city and its police  
 9 department for employment discrimination under the Fair Employment and  
 10 Housing Act. (Gov. Code, §§ 12900 et seq.) (FEHA).) The trial court sustained  
 11 a general demurrer without leave to amend on the ground that the plaintiff  
 12 failed to allege that he complied with the claim filing requirement of the  
 13 Government Claims Act. The Court of Appeal reversed, holding that the  
 14 purpose and procedures of the FEHA demonstrate a legislative intent that  
 15 actions against governmental entities brought under the FEHA are to be  
 16 excepted from the general requirements of the Tort Claims Act." (*Id.* at p.  
 17 865.) After describing the statutory scheme in considerable detail, the court  
 18 explained its reasoning: "The procedural guidelines and the time framework  
 19 provided in the FEHA are special rules for this particular type of claim which  
 20 control over the general rules governing claims against governmental entities.  
 21 The FEHA not only creates a statutory cause of action, but sets out a  
 22 comprehensive scheme for administrative enforcement, emphasizing  
 23 conciliation, persuasion, and voluntary compliance, and containing specific  
 24 limitations periods." (*Id.* at p. 868.)

25 As alleged in the AC in this action, Plaintiff properly pled the entire factual scenario  
 1 surrounding his FEHA Complaint. (See AC ¶¶ 53-55 and Exhibit A.) Plaintiff's Claim was  
 2 submitted to the DFEH on April 12, 2022. On that same date, the claim was closed and the  
 3 DFEH provided Plaintiff a Right to Sue notice. The notice letter advised Plaintiff: "The civil  
 4 action must be filed within one year of the date of this letter." This civil action was filed on  
 5 January 10, 2023, well within the one year timeline provided by the DFEH. Given the  
 6 allegations stated in the AC concerning Plaintiff's DFEH Complaint, along with Exhibit A  
 7 attached to the AC, it is clear Plaintiff is excepted from the Tort Claims Act requirements.

1 MCNEFF followed the proper procedure for the DFEH claim he filed that was based upon his  
 2 discriminatory termination that resulted from First Amendment right to free speech activities  
 3 he engaged in while off-duty. Given the DFEH exception, the motion should be denied as to  
 4 the Second Claim.

5 **c. Plaintiff has properly pled a claim pursuant to Labor Code § 96(k) which  
 6 encompasses the specific conduct in Labor Code § 98.6**

7 Defendants argue Plaintiff does not have the right to enforce an alleged violation of  
 8 this Labor Code § 96(k). Section 96(k) addresses “[c]laims for loss of wages as the result of  
 9 demotion, suspension, or discharge from employment for lawful conduct occurring during  
 10 nonworking hours away from the employer's premises.” Cal. Lab. Code § 96(k). California  
 11 courts have found that the scope of § 96(k) is limited to ““lawful conduct occurring during  
 12 nonworking hours away from the employer's premises' asserting ‘recognized constitutional  
 13 rights.”” *Grinzi v. San Diego Hospice Corp.*, 120 Cal.App.4th 72, 86 (2004) (quoting *Barbee*  
 14 *v. Household Auto. Fin. Corp.*, 113 Cal.App.4th 525, 533 (2003)).

15 California Labor Code § 98.6 references § 96(k) and states “(a) A person shall not  
 16 discharge an employee or in any manner discriminate, retaliate, or take any adverse action  
 17 against any employee or applicant for employment because the employee or applicant  
 18 engaged in any conduct delineated in this chapter, **including the conduct described in**  
 19 **subdivision (k) of Section 96**, and Chapter 5 (commencing with Section 1101) of Part 3 of  
 20 Division 2.” Thus, Plaintiff has stated a proper claim related to § 98.6 and predicated on a  
 21 violation of § 96(k). Plaintiff alleged that his discharge occurred because he asserted a  
 22 recognized constitutional right to free speech while off-duty. ( See AC ¶¶ 74-80) Therefore,  
 23 Plaintiff respectfully requests the Court to deny the Motion to Dismiss his Labor Code section  
 24 96(k) claim. However, to the extent the Court disagrees, Plaintiff seeks leave to amend.

## **CONCLUSION**

Based on the foregoing, Plaintiff requests the motion to dismiss be denied. However, should this Court find any of the claims made by Defendants have merit, Plaintiff requests a reasonable opportunity to file a Second Amended Complaint to secure any deficiencies in the Amended Complaint

Respectfully submitted,

DATED: May 30, 2023

/s/ *Karen Kenney*  
KAREN KENNEY  
*Attorney for Plaintiff PETER MCNEFF*

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